THE PROGRESS OF THE LAW, 1919-1920

ESTATES AND FUTURE INTERESTS

LORD BIRKENHEAD'S Law of Property Bill now pending before Parliament proposes far-reaching reforms. It contains provisions for assimilating the law of real property with the law of personal property by enacting that all land shall have the incidents of a chattel real held in perpetuity; for the registration of land; for the repeal of the Statute of Uses; and for placing "all interests in land, except legal estates in fee simple and for a term of years absolute, behind a curtain consisting of either a trust for sale or a settlement," and freeing "a purchaser in good faith from any obligation to look behind the curtain." The bill has been fully discussed in the periodicals.[1] New South Wales[2] and Victoria[3] have passed Real Property Acts.

Two text-books, both second editions and both of distinguished excellence, have appeared in 1920.[4] An examination of the cases following will show that a large proportion of our litigated problems in future interests now consists in the making and application of rules of construction. Mr. Kales has as successfully dealt with these rules for Illinois and in many instances for the whole country as Jarman did for England. Mr. Tiffany has secured his position as the leading American text writer on conveyancing. Reviews of both books appear on other pages of the Review.

An article on "Seisin" by the late Judge Francis M. Finch appears in the *Cornell Law Quarterly*.[5] This was one of a series of lectures delivered by him entitled "The History and Evolution of the Law," and is described as typical of the series.

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[1] Editorial Notes in 64 SOL. JOUR. 373, 388, 407, 460; James E. Hogg in 64 SOL. JOUR. 385, 405, 421, 442, 458, 474; Arthur Underhill in 36 L. QUART. REV. 107; Charles P. Sanger in 20 COL. L. REV. 652 (June, 1920); Manley O. Hudson in 34 HARV. L. REV. 341.

[2] 1919 CONVEYANCING ACT, N. S. Wales, No. 6.

[3] 1918 REAL PROPERTY ACT in Victoria, No. 2962.

[4] KALES, ESTATES AND FUTURE INTERESTS, 2 ed.; TIFFANY, THE LAW OF REAL PROPERTY, 2 ed.

[5] 4 CORNELL L. Q. 1.

ESTATES

I. In this country estates tail survive in a few states. In many jurisdictions they are in terms abolished by the legislatures. The common form of statute is to turn the estate into a fee simple in the first taker; but occasionally he takes a life estate with remainder in fee simple to his issue. In a number of states the statutes are silent as to estates tail. It is said that the Statute De Donis,[6] creating estates tail in England, was brought by the colonists to America. It has been held in Iowa, where the statutes do not mention estates tail, that the Statute De Donis is contrary to the customs and institutions of that state, and therefore not a part of its law. And so if an estate tail is attempted in Iowa a fee simple conditional, such as existed in England prior to that statute results.[7] This fee was subject to be defeated by the failure of lineal heirs of the first taker. But the judges, who seem for centuries to have been opposed to the tying up of property in families, held that as soon as the first taker had issue born he could alienate so as to deprive his issue and the donor of any possible interests in the land. Mr. Kales says of the present situation in Iowa, "As a specimen of a legal antiquity it is certainly entitled to first place."[8] The Supreme Court of Nebraska has just given its approval to this doctrine as part of the law of Nebraska. Its remarks, however, are *dicta*, for the court held that a conditional fee did not occur in the will under consideration.[9]

II. By Revised Statutes (1909), § 2872, one who in Missouri would take a fee tail by the English common or statute law is "seized thereof for his natural life only; and the remainder shall pass in fee simple absolute to the person to whom the estate-tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law." The Supreme Court[10] held that the eldest son of the devisee must share the remainder with his brothers and sisters. This may well be supported,[11] without saying, as the court did, "the idea that any

[6] STAT. 13 EDW. I, chap. I (1285). GRAY, PERPETUITIES, 3 ed., § 19 n.

[7] Kepler *v.* Larson, 131 Iowa, 438, 442, 108 N. W. 1033 (1906).

[8] KALES, FUTURE INTERESTS, 2 ed., § 19.

[9] Yates *v.* Yates, 178 N. W. (Neb.) 262 (1920).

[10] Gillilan *v.* Gillilan, 278 Mo. 99, 212 S. W. 348, 350 (1919).

[11] 1 LAW SERIES, MISSOURI BULLETIN, 19. See Yates *v.* Yates, 178 N. W. (Neb.) 262, 265 (1920).

such preference in the descent of real property could co-exist in the laws of any of the states, with the axioms of the federal Constitution guaranteeing equal protection of the laws to all persons and a republican form of government for each state, or with the social and political life modeled on those fundamental principles, is an unthinkable absurdity." The Massachusetts lawyer does not prize highly the estate tail of England since the Statute De Donis, which the laws of the Commonwealth recognize as here existing; [12] but he would be surprised to learn that it violated the Constitution of the United States.

Reversions and Remainders

I. A Georgia will devised to the testator's wife a dwelling "to have, hold, use and occupy, as a home for her and our children for and during the natural life of my said wife, or until she shall marry again. Upon the happening of either of which events, said property shall go to and belong to my children that may be living at the time of the death or marriage of my said wife, share and share alike, or if any of my children shall be dead at that time, leaving children surviving them, such last mentioned children shall take the share of their deceased parent." The Federal Court [13] correctly held the remainder to the children to be contingent.

Whether a remainder is vested or contingent depends upon the words used. If the language importing contingency is incorporated into the description of the remainderman, the interest is contingent.[14] Gifts to "such children as survive," or "children who survive" the life tenant, or to "children if living," are contingent.[15] And a gift over, if any die before the life tenant, does not render the prior interest vested.[16]

Yet in *Cole* v. *Cole*,[17] where property was bequeathed to A for

[12] Rev. Laws (1902), c. 127, §§ 24–27. Gray, Rule Against Perpetuities, 3 ed., § 19 n. Of course this involves primogeniture. Wright *v.* Thayer, 1 Gray (Mass.) 284 (1854).

[13] Swann *v.* Austell, 261 Fed. 465 (1919). The headnote is misleading.

[14] Gray, Rule Against Perpetuities, 3 ed., § 108.

[15] Duffield *v.* Duffield, 1 Dow & Cl. 268 (1828); *In re* Francis, [1905] 2 Ch. 295; Abbott *v.* Jenkins, 10 S. & R. (Pa.) 296 (1823); Kales, Future Interests, 2 ed., § 309. Compare Thompson *v.* Humphrey, 179 N. C. 44, 101 S. E. 738 (1919).

[16] Blakeley *v.* Mansfield, 274 Ill. 133, 113 N. E. 38 (1916). See Festing *v.* Allen, 12 M. & W. 279 (1843).

[17] 292 Ill. 154, 126 N. E. 752 (1920).

life, and at his decease to be divided among his children, and if A have no children or grandchildren to be divided among the testator's other children, the Illinois court relying on *Furnish* v. *Rogers* [18] and *Golladay* v. *Knock*,[19] held the gift to the children contingent. The earlier Illinois cases have been criticized,[20] and must be deemed incorrect. And *Cole* v. *Cole* should also be disapproved. That the interests were of personalty can make no difference, especially in Illinois.[21]

II. Suppose a devise of land to A for life, remainder to B "after the death" of A. If the words quoted, or similar words, are to be taken literally, B cannot take till A's death, an event possibly not occurring till after the termination of A's life estate by forfeiture or merger. The remainder would, therefore, be contingent and destructible at common law. But courts, which lean towards the vesting of future interests, have always construed those expressions to mean "at the termination, whenever and however, of the particular freehold estate." The remainder is, therefore, vested,[22] and three recent cases so hold.[23]

III. If a gift be made by will to A for life, with remainder to B to take effect whenever and however the prior estate ends, B's estate takes effect in possession at once if A's estate terminates in any fashion. If the interest after A's life estate is expressed to B "after the death of A" by the received construction noted above "at A's death" means "at the termination of A's life estate, whenever and however that may occur," B's interest is vested and subject to acceleration. Acceleration will occur if A's interest is void because he witnessed the will creating it,[24] or because his devise was revoked by a later codicil.[25] It is said that this is to promote

[18] 154 Ill. 569, 39 N. E. 989 (1895).

[19] 235 Ill. 412, 85 N. E. 649 (1908).

[20] KALES, FUTURE INTERESTS, 2 ed., § 349.

[21] Scofield *v.* Olcott, 120 Ill. 362, 11 N. E. 351 (1887).

[22] GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 103, n. 1.

[23] Dowd *v.* Scally, 174 N. W. (Iowa) 938 (1919); Real Estate Title Co. *v.* Dearborn, 109 Atl. (Me.) 816 (1920). And see Montague *v.* Curtis, 191 App. Div. 904, 110 Misc. 717, 181 N. Y. Supp. 709, 711 (1920).

[24] Jull *v.* Jacobs, 3 Ch. D. 703 (1876).

[25] Lainson *v.* Lainson, 18 Beav. 1 (1853); Eavestaff *v.* Austin, 19 Beav. 591 (1854). 1 JARMAN, WILLS, 6 Eng. ed., p. 719; KALES, FUTURE INTERESTS, 2 ed., § 599. Compare Crozier *v.* Crozier, 3 Dr. & W. 353 (1843); *In re* Mortimer, [1905] 2 Ch. 502; GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 251. See an article on acceleration in 32 L. QUART. REV. 392, 397, 398.

the testator's intention as shown by the language of the will.[26] Rather, the judges are expressing a rule for guidance in a case which the testator did not have in contemplation,[27] and upon which he said nothing. Of course if it is clear from the will that such a construction would have defeated the intention of the testator had the contingency been called to his attention, the rule does not apply.

If the interests created by the will are to a widow for life with a direction to the executor to sell at her death and divide the proceeds between named persons, the future interests are vested remainders. And if the widow renounces the life estate to take her statutory share, some courts accelerate the remainders, as in the case of void or revoked life estates.[28] Suppose, however, that the taking by the widow of her intestate share so disappoints the residuary legatee that unless the life estate be preserved for his benefit by a refusal to accelerate the remainders, the amount left to him will be far short of what the testator intended him to have. In Pennsylvania this consideration does not affect the matter, and there will be acceleration nevertheless.[29] A recent Michigan case,[30] however, striving to carry out the testator's probable intent, finds in this fact enough on the face of the will to show that the testator intended to have no acceleration. This result is in accordance with the weight of authority.[31]

If the gift over after the life estate is to those who may "then be living" or who "survive" the life tenant, the settled rule is that there is no acceleration if the widow to whom the life estate is limited renounces,[32] and two recent cases so hold.[33] Where the

[26] Compton *v.* Rixey, 124 Va. 548, 98 S. E. 651, 652 (1919).

[27] GRAY, NATURE AND SOURCES OF THE LAW, § 702.

[28] Slocum *v.* Hagaman, 176 Ill. 533, 539, 52 N. E. 332 (1898); Disston's Estate, 257 Pa. 537, 101 Atl. 804 (1917). But see Rocker *v.* Metzger, 171 Ind. 364, 86 N. E. 403 (1908).

[29] Ferguson's Estate, 138 Pa. 208, 20 Atl. 945 (1890); Vance's Estate, 141 Pa. 201, 21 Atl. 643 (1891). And see a recent case, Hesseltine *v.* Partridge, 236 Mass. 77, 127 N. E. 429 (1920). On acceleration because of a prior void accumulation see Thistle's Estate, 263 Pa. 60, 106 Atl. 94 (1919).

[30] Sellick *v.* Sellick, 173 N. W. (Mich.) 609 (1919).

[31] 2 WOERNER, AM. LAW ADM., 2 ed. §§ 119, 439. TIFFANY, REAL PROPERTY, 2 ed., § 146.

[32] Wakefield *v.* Wakefield, 256 Ill. 296, 100 N. E. 275 (1912).

[33] Swann *v.* Austell, 261 Fed. 465 (1919); Compton *v.* Rixey, 124 Va. 548, 98 S. E. 651 (1919).

rule of destructibility is in force the contingent remainder is said not to be destroyed by the renunciation of the life estate, for the interest relinquished passes by the will to the legatees who are disappointed by the widow's election.[34]

In re Conyngham.[35] The testator by will created equitable interests in realty as follows: To the plaintiff, his brother and heir, for life; remainder to the plaintiff's first and other sons successively in tail male; remainder to the testator's nephew, the infant defendant, for life; remainders over with an ultimate remainder to the testator's heirs. The testator revoked the life estate to his brother, and died a bachelor. The plaintiff was married but had no children. It was held that the defendant's life interest in the rents and profits was accelerated until the plaintiff had a son. Intention was emphasized. Down to *In re Willis*[36] several decisions[37] had favored the heir where a contingent interest was interpolated between the life estate which had failed and a vested future estate. In that case the life estate was disclaimed not revoked, but the interests, as here, were equitable, and the decision was the same. The earlier cases are distinguished as dealing with legal interests, or on the special facts; but since 1917 the judicial attitude seems less favorable to a temporary intestacy in this class of cases.[38]

IV. Suppose there be a devise to A for life, remainder to B, a bachelor and heir at law of the testator, for life, remainder to the children of B or B's descendants him surviving in fee; but if B die without children or descendants him surviving to a charity. Here B's children and the charity are said to have contingent remainders in fee;[39] and B, besides his life estate, to have a reversion in fee.[40] These two estates of B's, being created at the same time and through a single instrument, do not merge so as to destroy the contingent remainders.[41] Now suppose that B, while still a bachelor

[34] Wakefield *v.* Wakefield, 256 Ill. 296, 100 N. E. 275 (1912). Compare Page *v.* Rouss, 103 S. E. (W. Va.) 289 (1920).

[35] [1920] 2 Ch. 495.

[36] [1917] 1 Ch. 365.

[37] Carrick *v.* Errington, 2 P. Wms. 361 (1726); Hopkins *v.* Hopkins, 1 Atk. 581 (1738); *In re* Scott, [1911] 2 Ch. 374. See 1 JARMAN, WILLS, 6 ed., 718, 719.

[38] See 32 L. QUART. REV. 392; 33 L. QUART. REV. 132.

[39] Loddington *v.* Kime, 1 Salk. 224; Peoria *v.* Darst, 101 Ill. 609 (1882).

[40] GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 11; KALES, FUTURE INTERESTS, 2 ed., § 91.

[41] Plunket *v.* Holmes, 1 Lev. 11 (1658); FEARNE, CONTINGENT REMAINDERS, 10 ed.,

and during the life of A, conveys both his estates to X with the declared purpose of destroying the contingent interests, and that B then marries and has a child born a few months after the death of A. The Illinois court [42] has just said that B's life estate merged in his assigned reversion, but that the contingent remainders having still A's life estate to support them were not destroyed, until A died, as he did, before the contingent remainders vested.

If a tenant for life who also owns the reversion or a vested remainder conveys both to another person, intermediate contingent remainders are destroyed by the merger of the life estate in the vested remainder.[43] The concession indicated above, where there was no destruction of intermediate contingent remainders if the estates were created by the same instrument, was merely a modification to prevent settlements from being nugatory at the outset. No doubt there may be merger though both estates which coalesce in the same person are remainders, and not as to one an estate in possession.[44] No authority has been found which demonstrates so well as the principal case that the reason for the destruction of a contingent remainder by merger is not that it is squeezed to death by the union of the two estates, but that it fails, as is commonly stated,[45] for want of a freehold to support it.

V. In *Matthews* v. *Andrews* [46] the testator devised a lot of land to T for life, and on the death of T leaving children or descendants to them, and if T died leaving no children or descendants to E. The will contained this, the fifth, clause: "I give all my personal estate, together with the rest and residue of my lands or other estate, unto my said wife." T was the only heir of the testator; and conveyed all his interest in the lot to a third person, reciting that he conveyed his life estate under the will and the reversion

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p. 345; Biwer *v.* Martin, 128 N. E. (Ill.) 518 (1920). The descent of a reversion upon the life tenant as heir at law was present in novel form in Cole *v.* Cole, 292 Ill. 154, 126 N. E. 752 (1920). See 15 ILLINOIS L. REV. 335.

[42] Gray *v.* Shinn, 293 Ill. 573, 127 N. E. 755 (1920).

[43] FEARNE, CONTINGENT REMAINDERS, 10 ed., 339; Co. Lit. 28*a*, Hargrave n. 8; 3 PRESTON, CONVEYANCING, 3 ed., 113; CHALLIS, REAL PROPERTY, 3 ed., 137; Randolph *v.* Wilkinson, 128 N. E. (Ill.) 525 (1920). See Stevens *v.* Van Brocklin, 129 N. E. (Ill.) 68 (1920).

[44] 3 PRESTON, CONVEYANCING, 3 ed., 50, 51.

[45] FEARNE, CONTINGENT REMAINDERS, 10 ed., 324; CHALLIS, REAL PROPERTY, 3 ed., 137; KALES, FUTURE INTERESTS, 2 ed., § 311.

[46] 290 Ill. 103, 124 N. E. 871 (1919).

which had descended on him for the purpose of destroying the contingent remainders. There is no doubt, however, that any estate that the testator had in the lot after the specific bequests thereof passed to his wife under the fifth clause,[47] and that, therefore, all that T conveyed was his life estate, which left the contingent remainders unaffected. And so the court held.

Friedman v. *Friedman* [48] presents a point over which there has been much controversy. The limitations by will were of land to A for life and then to such of the testator's children as might be living at A's death in fee; but if any of the testator's children predeceased A leaving children, such children were to take their parent's share in the same manner as if the parent had survived A. The residue was bequeathed to the testator's children. A and the testator's children conveyed all their interests to the same person with the avowed purpose of destroying the contingent remainders. The court found that the two interests after A's life estate were contingent remainders with a double aspect which were defeated by merger of the life estate. The court did not attempt precisely to define the interest created by the residue other than to say that "the reversion in fee did not pass out of the owner and vest in the remainderman, but remained in him and vested in his heirs under the twelfth [residuary] clause of the will, pending the determination of the particular estate." [49]

High authority has considered a definition of this interest to be controlling. In *Egerton* v. *Massey*,[50] where the facts were substantially similar except that the life tenant and residuary devisee were the same, the decision also was in favor of the destruction of the contingent remainders.

Mr. Gray supports *Egerton* v. *Massey* solely on the ground that the court spoke of the residuary devise as a reversion, which he takes to mean the grant of a reversion, although created and granted by the same instrument that created the particular estate.[51] He says, however, that the residue has most of the characteristics of a remainder. "It is a future estate, taking effect, if at all, at the

[47] Egerton *v.* Massey, 3 C. B. (N. S.) 338 (1857); Benson *v.* Tanner, 276 Ill. 594, 115 N. E. 191 (1917); Friedman *v.* Friedman, 283 Ill. 383, 119 N. E. 321 (1918).

[48] 283 Ill. 383, 119 N. E. 321 (1918).

[49] 283 Ill. 383, 389, 119 N. E. 321 (1918).

[50] 3 C. B. (N. S.) 338 (1857).

[51] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 113*a* and 113*b*.

termination of the particular estate and created by the same instrument." But, he goes on, there cannot be a vested remainder after a contingent remainder in fee.[52]

Mr. Kales, in the last edition of his book on Future Interests, challenges Mr. Gray's statement that the residuary devise in the grant of the reversion, as being based on the impossible view that the testator dies at one time as regards the beginning of his will and later with respect to the residuary clause; or else that the will takes "effect in sections, with momentary lapses of time between each and that there was a moment of time in which the heir at law had a reversion by descent and then (*mirabile dictu*) the later clause of the will operated as an assignment by the testator (*sic*) of the reversion which had already vested in the testator's heir." [53] Mr. Kales then seems to suggest that the contingent future interests become executory devises operating by way of conditions subsequent to divest the vested remainders.[54] And, as executory devises are indestructible, he dissents from the results reached in *Egerton* v. *Massey* and *Friedman* v. *Friedman*.

In the face of such a conflict of eminent authority it may not be presumptuous to suggest a third view. It is submitted that Mr. Kales is entirely sound in finding the creation of a vested remainder by the residuary clause, but that this is no reason for turning the intermediate interests into executory devises. For it is submitted that despite the array of distinguished conveyancers to the contrary no valid reason exists for saying that there cannot be a vested remainder after a contingent remainder in fee.[55] The contingent interest, it is true, may vest and prevent the vested remainder from ever being effective in possession; but that a vested remainderman may never become entitled in possession is no argument against the vested character of the remainder.[56] It is admitted that under a devise to a bachelor for life, remainder to his children *for life*, remainder to B, that B's interest is a vested remainder;

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[52] Loddington *v.* Kime, 1 Salk. 224; FEARNE, CONTINGENT REMAINDERS, 10 ed., 225. SUGDEN, POWERS, 8 ed., 513. Compare CHALLIS, REAL PROPERTY, 3 ed., 80, 81.

[53] KALES, FUTURE INTERESTS, 2 ed., § 95.

[54] This was Mr. Preston's view. ESTATES, 2 ed., 84, 502.

[55] HAYES, LIMITATIONS, 81. And see TIFFANY, REAL PROPERTY, 2 ed., § 142.

[56] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 104, 108; TIFFANY, REAL PROPERTY, 2 ed., § 137.

and that the same is true if after A's life estate there were two alternative contingent remainders *for life*. No reason is conceived why B's estate should change its character or the contingent interests change their character because the contingent interests are *in fee*. B's interest is ready to take effect in possession whenever and however the preceding estates end.[57] If it be said that the happening of the contingency operates as a condition subsequent and causes the remainder to B wholly to be divested by an executory devise, the remainder to B must be *partially* divested by the vesting of a contingent interest *for life*. And no one contends that what would otherwise be a contingent remainder for life becomes an executory devise for life by reason of its being followed by a vested remainder in B. If, as all admit,[58] a contingent remainder is not an estate but a possibility of an estate, it is difficult to see how the fact that it is in fee or for life should in any way change the character of it or other interests.

It is, perhaps, not without significance that Mr. Joshua Williams, who was counsel for the successful party in *Egerton* v. *Massey*, referred in argument to the interest created by the residuary gift as a remainder.[59] In his work on Settlements, in discussing the decision, he speaks of the residuary gift indifferently as a reversion or as a remainder.[60] Cockburn, C. J., in his opinion terms it a reversion; but in the course of the argument he asked Mr. Joshua Williams this question: "Your contention is, that the estate for life merged in the remainder in fee?" [61]

Much as we regret the existence of the doctrine of destructibility of contingent remainders in Illinois we are forced to the conclusion that the intermediate estates in *Egerton* v. *Massey* and *Friedman* v. *Friedman* were contingent remainders which were destroyed by

[57] See Mr. Gray's definition of a vested remainder, RULE AGAINST PERPETUITIES, 3 ed., § 101.

[58] WILLIAMS, REAL PROPERTY, 21 ed., 361; CHALLIS, REAL PROPERTY, 3 ed., 86. GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 113*b*. Gray *v.* Shinn, 293 Ill. 573, 127 N. E. 755 (1920). In Du Bois *v.* Judy, 291 Ill. 340, 126 N. E. 104, 107 (1920), the court said that a contingent remainder, not being a right in land but merely a possibility of an estate, did not pass under a quitclaim deed by the prospective owners of the interest, when the remainder was to those who survive the life tenant, and the deed was given before the latter's decease.

[59] 3 C. B. (N. S.) 338, 355 (1857).

[60] WILLIAMS, SETTLEMENTS, 209, 210.

[61] 3 C. B. (N. S.) 355, 357 (1857).

merger when the life estate in possession and the ultimate vested remainder in fee conferred by the residuary gift united by the conveyance to one person.

VI. The problem of merger has ordinarily arisen in regard to interests created by wills. The Illinois court has held the doctrine of merger inapplicable where the estates were originally created by deed with warranty.[62] In *Biwer* v. *Martin* the settlor created a life estate in himself, remainder to his son, B, for life, contingent remainder to his son's widow for life, contingent remainder in fee to B's descendants him surviving, reversion in the settlor and his heirs. A's and B's life estates were transferred to X, and the reversion to X through Y with intent to destroy contingent remainders. The court held that the covenant of warranty, which was synonymous with a covenant for quiet enjoyment, prevented merger and held that the contingent remainders were not destroyed. But destructibility is an inherent quality and weakness of a contingent remainder. And this weakness may be taken advantage of by any one, even by him who with covenants created the remainder. These covenants cannot extend to future acts by which the settlor or those claiming under him take advantage of one of the natural limitations of the interest.[63]

VII. Lord Coke said, "If a man make a gift in tail, of a lease for life, the remainder to his own right heirs, this remainder is void, and he hath a reversion in him." [64] And the Kentucky and Illinois courts agree.[65]

VIII. The rights of an adverse possessor against a reversioner or remainderman are fully discussed by Mr. Kales in his new edition.[66] If the life tenant makes a conveyance of the fee, the adverse possessor claiming thereunder cannot assert that the statute of limitations has begun to run in his favor until the death of the life tenant. In a recent Illinois case a life tenant mortgaged land warranting title. The assignee of the mortgage foreclosed and conveyed the property by warranty deed. The court conceded that this deed of the assignee gave color of title to those claiming

[62] 128 N. E. (Ill.) 518 (1920).

[63] See 34 HARV. L. REV. 430.

[64] Co. Lit. 22*b*. King *v.* Dunham, 31 Ga. 743 (1861), *accord*.

[65] Nuckols *v.* Davis, 221 S. W. (Ky.) 507 (1920); Biwer *v.* Martin, 128 N. E. (Ill.) 518, 521 (1920).

[66] KALES, FUTURE INTERESTS, 2 ed., §§ 383–397.

under it; but held that the statute did not run in their favor until the death of the original life tenant.[67]

THE RULE IN SHELLEY'S CASE

I. The Rule in Shelley's Case presupposes two circumstances, — a freehold in the ancestor, and a remainder to the heirs or heirs of the body; and there are two principles involved. The first and the more difficult principle is one of interpretation, to discover whether the remainder is to the "heirs" or "heirs of the body" of the ancestor, or whether it is to the "children," "sons," "relatives," etc., of the ancestor. If the word "heirs" is used, or, if not used, the words employed are susceptible of that construction, the second principle is invoked; that is, the estate in remainder is inexorably turned into a fee simple or fee tail in the ancestor. If no estate intervenes between the life estate and the fee, there is a merger, and the ancestor becomes seised of a fee simple in possession. If, however, another interest has been inserted between the life estate and the limitation to the heirs, the ancestor is seised of an estate for life in possession with a mesne vested remainder to himself in tail or in fee as the case may be.

On the other hand, even though the word "heirs" is used in the original limitations, if by sound construction some other class of persons than heirs is meant, the Rule does not apply; and there is, as intended by the settlor, a contingent remainder to the persons designated.[68]

It should thus be kept steadily in mind that the Rule is a rule of law defeating intent and not a rule of construction. There is indeed the preliminary question of interpretation; but once it is found that the remainder is to heirs the Rule is ruthlessly applied even though it be clear that the settlor intended a life estate and a contingent remainder to the heirs of the owner thereof.[69]

Yet in *Roe* v. *Grew* [70] in 1767 it was suggested that the whole

[67] Gibbs *v.* Gerdes, 291 Ill. 490, 126 N. E. 155 (1920). See Nickerson *v.* Nickerson, 235 Mass. 348, 128 N. E. 834, 838 (1920); Youmans *v.* Youmans, 105 S. E. (S. C.) 31 (1920).

[68] 1 HAYES, CONVEYANCING, 5 ed., 542–546. Lord Redesdale in Jesson *v.* Wright, 2 Bligh, 1, 56 (1820); Cockburn, C. J., in Jordan *v.* Adams, 9 C. B. (N. S.) 483, 496–500 (1861); Blackledge *v.* Simmons, 105 S. E. (N. C.) 202 (1920).

[69] Coulson *v.* Coulson, 2 Strange, 1125; Perrin *v.* Blake, 4 Burr. 2579 (1770).

[70] 2 Wils. 322 (1767).

foundation of the Rule was interpretation, that there was a general intention that the estate should travel through the issue generally of a certain person, accompanied by a particular intention that the first taker have an estate for life, and the Rule in Shelley's Case was applied to give effect to the general intent, — which was said to override the particular intent. This notion was fostered by Lord Eldon; [71] but was severely shaken by Lord Redesdale [72] in the same case, by Lord Denman [73] in 1833, and Lord Wensleydale [74] in 1858. Later Lord Cairns revived it; [75] and his approval has been the basis of a recent discussion of the Rule by the Nebraska court.[76] A Nebraska statute read that ". . . it shall be the duty of the courts of justice to carry into effect the true interest of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law." [77] This statute, it was said, did not abrogate the Rule in Shelley's Case, for that Rule (and Lord Cairns was cited) is designed to carry out the general intention of the testator. We regret that the true nature of the Rule was not observed. But even had it been truly perceived, the court might well have said in view of the last clause of the statute that the Rule was still in force in Nebraska.

II. A Victorian statute enacted that "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." [78] A will made after this act contained a trust of real estate "for my daughter Rosetta Campbell during her life and upon her death then as to said lands and tenements and the rents and profits thereof upon trust for her lawful issue and if more than one as tenants in common." [79] The High Court of Australia held a year ago that Rosetta took an estate for life and not an estate tail.

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[71] Jesson *v.* Wright, 2 Bligh, 1, 51, 52 (1820). [72] *Ibid.*, pp. 56, 57 (1820).
[73] Doe d. Gallini *v.* Gallini, 5 B. & Ad. 621, 640 (1833).
[74] Roddy *v.* Fitzgerald, 6 H. L. C. 823, 877 (1857).
[75] Bowen *v.* Lewis, 9 A. C. 890, 907 (1884).
[76] Yates *v.* Yates, 178 N. W. (Neb.) 262 (1920). See 19 MICH. L. REV. 113.
[77] NEBRASKA REV. STAT. (1913), § 6195.
[78] 1890 VICTORIAN STAT. 3626. [79] *In re* Cust, [1919] V. L. R. 693.

The Rule has no application unless the words used in the remainder are words of limitation, and not words of purchase.[80] *Lees* v. *Mosley* [81] had decided in England that prior to the Wills Act, which contained a clause similar to the Victorian Act, a devise to A for life remainder to his issue in equal shares with a limitation to the heirs of the issue, vested in A a tenancy for life only, for the "issue" took as purchasers. The words of distribution and limitation were thus held sufficient to mold the *prima facie* meaning of issue as embracing the whole line of inheritable descendants. The Australian court correctly decided that the same principle applied where words of distribution, *i. e.* "as tenants in common," are present and words of limitation added to issue are supplied not by the testator but by the statute.[82]

III. A deed transferred land to "the heirs-at-law of Woodson P. Greene . . . reserving herein, however, and hereby conveying to Woodson P. Greene a life estate in the above described real estate, the said grantees first above named to have and receive said lands at the death of Woodson P. Davis." The Illinois court properly applied the Rule although the life estate was by reservation after the gift to the heirs. It further said that the last clause did not prevent the application of the Rule, for "It does not affect the case if the deed states that the heirs of Woodson P. Greene at his death shall take as purchasers;" [83] this, though the court had already stated that the Rule applied when "the heirs" were used as words of limitations. The theory is thus expressed by Lord Commissioner Wilmot in *Sayer* v. *Masterman:* [84] "Suppose one devises to A. and the Heirs of the Body of A. and says, 'I declare that the Heirs of the Body of A. shall take by Purchase,' can the Intent be more manifest and express? And yet A. shall have an Estate Tail; for the Testator shall not be permitted to controul the legal operation of the words." The authorities are collected and carefully discussed, especially those in Illinois, by Mr. Kales.[85]

IV. A deed conveyed land to a daughter "during her natural

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[80] 9 L. QUART. REV. 2. Compare KALES, FUTURE INTERESTS, 2 ed., §§ 421–428.

[81] 1 Y. & C. 589 (1835).

[82] See 2 JARMAN, WILLS, 6 Eng. ed., 1944–1951. The case is discussed and the authorities collected in 33 HARV. L. REV. 988.

[83] Du Bois *v.* Judy, 291 Ill. 340, 342, 346, 126 N. E. 104, 106 (1920).

[84] Wilm. 386, 403 (1757).

[85] KALES, FUTURE INTERESTS, 2 ed., §§ 421–428, especially § 421.

life, and after her death to the issue of her body" and provided that, if any child or children of the daughter should predecease her leaving a child or children, such child or children should take the share of the parent, but that if the daughter should die without leaving any issue living at her death, the land should revert. The Federal Circuit Court of Appeals,[86] administering South Carolina law, correctly held that "issue" meant "children," so as to vest a life estate in the daughter. The case should be compared with *Jesson* v. *Wright*.[87]

In *McCllen* v. *Lehker*,[88] the Indiana court said that "heirs" cannot be construed in a will to mean "children" unless it very clearly appears to have been so used. The whole discussion of the Rule as one defeating intention is excellent. On the other hand, "heirs" was held to mean "children" on slight considerations in Illinois.[89]

"Legal representatives" has been held to mean "heirs;" [90] and "Descendants," "heirs of the body." [91]

V. There is a good discussion of the statutes abolishing the Rule in *Carter* v. *Reserve Gas Co.*;[92] an Arkansas statute is considered in *Johnson* v. *Dillinger*.[93]

Construction of Words and Phrases

I. A will read thus:

"'I give devise and bequeath all my property and estate, both real and personal, and wherever situated, to my next of kin and heirs at law, to be divided and distributed among them in the same proportions and shares provided for the descent and distribution of intestate estates of deceased persons under the laws of the State of Rhode Island.'" This with good reason was held not to include

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[86] Davenport *v.* Hickson, 261 Fed. 983 (1919).

[87] 2 Bligh, 1 (1820).

[88] 123 N. E. (Ind.) 475 (1919).

[89] Morris *v.* Phillips, 287 Ill. 633, 122 N. E. 831 (1919). See Wilson *v.* Harrold, 288 Ill. 388, 123 N. E. 563 (1919); Yates *v.* Yates, 178 N. W. (Neb.) 262 (1920); Beaty *v.* Calliss, 128 N. E. (Ill.) 547 (1920). See Blackledge *v.* Simmons, 105 S. E. (N. C.) 202 (1920).

[90] Nobles *v.* Nobles, 177 N. C. 243, 98 S. E. 715 (1919).

[91] Turner *v.* Monteiro, 103 S. E. (Va.) 572 (1920); Burkley *v.* Burkley, 109 Atl. (Pa.) 687 (1920).

[92] 100 S. E. (W. Va.) 738 (1919).

[93] 140 Ark. 509, 215 S. W. 694 (1919).

the widow.[94] A deed of land to a daughter for life, remainder to her "nearest relatives" included, on the authority of an earlier Kentucky case, not only the brother of the devisee but also children of her sister who died after the conveyance.[95] In England the law seems otherwise. There the next of kin by blood will take, excluding those who under the Statute of Distributions would take by representation. A brother, therefore, would not have to share with the children of a deceased brother.[96] The theory is that the term unlike "relations" is perfectly clear and not susceptible of the technical construction of exact reference to the Statute of Distributions. And in England it seems to be immaterial that the subject matter is either realty or personalty.[97] But the term "relations" is susceptible of very broad meaning, including persons of every degree of consanguinity, however remote. To prevent such gifts from being void for uncertainty the courts have applied them to persons who would take under the statute by intestacy as next of kin or as representatives of next of kin.[98] And there is a recent *dictum* in Missouri to this effect.[99]

II. "If property is limited to the 'issue of A,' issue primarily means the descendants or issue in every generation from A." [100] Of course this broad meaning can be restricted to children if the context so justifies. Now, if this broad interpretation be taken, a further question arises whether the meaning is to be all descendants per capita or only those descendants who have no ancestors living and who stand in the place of their deceased ancestor per stirpes. Suppose A in the above limitation has two children living at the time of distribution and each of these two children has a living child. Do the four descendants of A take each one-quarter, or do the children of A each take one-half? This is a case where evidently the testator has had no thought. Had the contingency been called to his attention, he would have undoubtedly provided for it. There

[94] Lewis *v.* Arnold, 105 Atl. (R. I.) 568 (1919); 2 JARMAN, WILLS, 6 Eng. ed., 1633.

[95] Holt *v.* Rudolph, 184 Ky. 161, 211 S. W. 855 (1919). Compare Barrett *v.* Egbertson, 111 Atl. (N. J.) 326 (1920).

[96] Marsh *v.* Marsh, 1 Bro. C. C. 293 (1783); Smith *v.* Campbell, 19 Ves. 400 (1815). But see *dicta* in Edge *v.* Salisbury, 1 Ambler, 70 (1749); *Re* Nash, 71 L. T. R. 5 (1894).

[97] Pyot *v.* Pyot, 1 Ves. Sen. 335 (1749).

[98] 2 JARMAN, WILLS, 6 Eng. ed., 1627, 1628. THEOBALD, WILLS, 7 ed., 323.

[99] Rauch *v.* Metz, 212 S. W. (Mo.) 353, 355 (1919); compare *In re* Keighley, [1919] 2 Ch. 388.

[100] KALES, FUTURE INTERESTS, 2 ed., § 575.

is nothing for the court to do but adopt the primary meaning of the word "issue" which is to include all descendants of A. Authority sanctions this view, and there are many cases holding that all descendants take per capita even though some compete with their living ancestors.[101]

Massachusetts has adopted a different construction. In *Jackson* v. *Jackson*[102] the gift was to the testator's son's wife for life and at her death to her husband "if then living, and if not, to her issue. And if she should survive her said husband and should have no issue, I give this $10,000 at her death to all my children then living, and the issue of any deceased child; such issue to take as by right of representation the shares of their respective parents." The son's wife survived the husband and died leaving two sons, a daughter, and a daughter of a deceased daughter. There were also five children of one of the sons. The court divided the gift among the sons, the daughter and the daughter of the deceased daughter to the exclusion of the five grandchildren by one of the living sons. In so holding the court assumed that the word "parents" at the end of the quotation did not apply to "issue" used in the first sentence; and it said: "when by a will personal property is given in trust to pay the income to a person during life, and on the death of such person to pay the principal sum to his issue then living, it is to be presumed that the intention was that the issue should include all lineal descendants, and that they should take per stirpes, unless from some other language of the will a contrary intention appears." It has been said that it is impossible to tell whether this is or is not *dictum*.[103] But in any event the case is one with which the Massachusetts conveyancer must seriously reckon.[104]

In 1896 the Rhode Island court fell in line with the weight of

[101] Maddock *v.* Legg, 25 Beav. 531 (1858); Freeman *v.* Parsley, 3 Ves. Jr. 421 (1797); Cook *v.* Cook, 2 Vern. 545 (1706); Price *v.* Sisson, 2 Beas. (N. J. Eq.) 168 (1860); Soper *v.* Brown, 136 N. Y. 244, 32 N. E. 768 (1892); Schmidt *v.* Jewett, 195 N. Y. 486, 88 N. E. 1110 (1909); Matter of Farmer's Loan & Trust Co., 213 N. Y. 168, 173, 107 N. E. 340 (1909); Wistar *v.* Scott, 105 Pa. 200 (1884); Ridley *v.* McPherson, 100 Tenn. 402, 43 S. W. 772 (1897).

[102] 153 Mass. 374, 378, 26 N. E. 1112 (1891).

[103] KALES, FUTURE INTERESTS, 2 ed., § 582.

[104] Hall *v.* Hall, 140 Mass. 267, 2 N. E. 700 (1885); Dexter *v.* Inches, 147 Mass. 324, 17 N. E. 551 (1888); Coates *v.* Burton, 191 Mass. 180, 77 N. E. 311 (1906). Compare Silsbee *v.* Silsbee, 211 Mass. 105, 109, 97 N. E. 758 (1912).

authority. In *Pearce* v. *Rickard* [105] the limitations were to A for life, and then to the issue of A alive at her death. At A's death four of her children survived her, one of whom had three and another four children. The trust fund was divided by the court into eleven shares, all sharing per capita. The effect of this decision, however, was soon abrogated by a statute applying to devises or bequests to one for life and thereafter to his issue.[106]

In *Rhode Island Hospital Trust Co.* v. *Bridgham* [107] the testator after devising all the residue of his estate, which consisted only of personal property, to the trust company on trust for his wife for life, proceeded thus: "And upon her death, I give, devise and bequeath all such rest, residue and remainder of my estate, in fee simple, absolutely and forever, to my brother, Joseph Bridgham, and his issue." The wife and brother, Joseph Bridgham, predeceased the testator. Joseph left four children, and three grandchildren who were children of one of these living children. The court held that Joseph and his issue took a fee simple as purchasers, and then proceeded to construe the word "issue." It recognized the logical and grammatical value of the rule of most jurisdictions (which had been approved in *Pearce* v. *Rickard*), but at the same time pointed out that some judges who had applied it had felt that a per capita distribution between child and grandchildren undoubtedly defeated the wishes of many testators. As there was no gift for life to the ancestor of the issue, the statute did not apply to the Bridgham Will. The court then took the interesting position that it was desirable that the few limitations not falling within the act, which applied to devises to issue in the form usually drawn, should be treated in the same way as those which came within it. It preferred, too, the rule of *Jackson* v. *Jackson*, as furthering the intention of most testators. And so the estate was divided equally between the children of Joseph to the exclusion of his grandchildren, and the last remnant of *Pearce* v. *Rickard* was swept away.

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[105] 18 R. I. 142, 26 Atl. 38 (1893).

[106] "Whenever a devise or bequest is made to one for life and thereafter to his issue, in any will hereafter made, such issue shall be construed to be the children of the life tenant living at his decease, and the lineal descendants of such children as may have then deceased, as tenants in common, but such descendants of any deceased child taking equally amongst them the share only which their deceased parent, if then living, would have taken." RHODE ISLAND, GEN. LAWS, (1909), c. 254, § 11.

[107] 106 Atl. (R. I.) 149 (1919).

The decision is an example of the reflex action of the legislature on the courts seen in other branches of the law.[108] Indeed it is almost an instance of a judge using an act of the legislature as a judicial precedent.

The New York cases, which take the orthodox view, were applied to let in grandchildren per capita with children in *Petry* v. *Petry*[109] in the Appellate Division of the Supreme Court of New York not long since. But the judge clearly stated his personal dislike of those decisions, and expressed the hope that the Court of Appeals would establish the rule of *Jackson* v. *Jackson*.

But is it not wiser "not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact?"[110]

In two recent lower court cases "issue" was held to mean "children" by reason of the construction of the whole will.[111]

III. Where property is given to "survivors" or to persons "if living," and several periods are possible to which to refer the survivorships or lives, the question arises, What period is to be taken if none is stated? The modern English rule is given in *Cripps* v. *Wolcott*,[112] that in bequests of personal property the words are *prima facie* to refer to the period of distribution and not to the death of the testator. The law was formerly otherwise.[113] *Cripps* v. *Wolcott* is followed if real estate is involved.[114] Accordingly, if a life estate intervenes, those who survive the life tenant are entitled.[115] The older English rule, however, is said to be law in Pennsylvania in a recent case.[116] Whatever the rule, if the testator's intent to refer to a particular period is apparent on the face of the will, that controls.[117]

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[108] 26 HARV. L. REV. 262, 264, note.

[109] 186 App. Div. 738, 175 N. Y. Supp. 30 (1919).

[110] Mr. Justice Holmes in Eaton *v.* Brown, 193 U. S. 411 (1904).

[111] New York Life Ins. Co. *v.* Phelps, 106 Misc. 687, 176 N. Y. Supp. 618 (1919); *In re* Durant's Estate, 109 Misc. 62, 178 N. Y. Supp. 111 (1919). And see Metropolitan Trust Co. *v.* Harris, 108 Misc. 34, 177 N. Y. Supp. 257 (1919). For a special construction of "heirs," see *In re* Munroe, 107 Misc. 408, 177 N. Y. Supp. 783 (1919).

[112] 4 Madd. 11 (1818).

[113] 2 JARMAN, WILLS, 6 Eng. ed., 2120–2132.

[114] *Re* Gregson's Trusts, 2 DeG. J. & S. 428 (1864).

[115] Cripps *v.* Wolcott, *supra;* Temple *v.* Scott, 143 Ill. 290, 32 N. E. 366 (1892).

[116] Kohl *v.* Kepler, 110 Atl. (Pa.) 239 (1920).

[117] Compare Thompson *v.* Humphrey, 179 N. C. 44, 101 S. E. 738 (1919).

IV. If there be a gift by will to A absolutely with a further gift over if A dies without children or issue, there seems to have been an inordinate amount of litigation over the question whether the contingency is to be referred to the death of A in the testator's lifetime or to A's death at any time. Many of the controversies are no doubt due to wills containing special words which are urged by counsel to control the general rule of the particular jurisdiction. In the absence of evidence on the will to the contrary England has wisely held that the contingency is to be taken at its face value and death of A at any time is meant.[118] In this country, even when the will presents the contingency in its simple form without aid from other parts of the document, the authorities are divided. Illinois follows England.[119] A recent New York case indicates that there the presumption is that death before the testator is meant, but that it will take little on the document to force the other construction.[120] In Minnesota the same question arose in 1919. The testator gave the residue to his wife and three children "share and share alike, provided, however, that if either of my children shall die without leaving a living child or children, then the share of such child shall become the property of the survivor or survivors." The court said that it would have been inclined to follow the rule which fettered the condition to dying in the testator's lifetime, had it not been that a contrary intention appeared on the face of the will. And so it found that death at any time was meant.[121] The presumption opposed to the English rule is often supported on the ground that it favors early vesting of estates. When the gift over on the death of the first taker is to survivors the case is complicated by the problem discussed above. If "survivors" by reason of special context or in contravention of the general rule is to be referred to survivors at the testator's death, then the inference arises that the word "die" should likewise be there referred.[122] This point was not discussed by the Minnesota court.

[118] Edwards *v.* Edwards, 15 Beav. 357 (1852).

[119] Blackstone *v.* Althouse, 278 Ill. 481, 116 N. E. 154 (1917). See Morris *v.* Phillips, 287 Ill. 633, 639, 122 N. E. 831 (1919).

[120] Erwin *v.* Waterbury, 186 App. Div. 569, 174 N. Y. Supp. 677 (1919); Washbon *v.* Cope, 144 N. Y. 287, 297, 39 N. E. 388 (1895); Matter of Cramer, 170 N. Y. 271, 63 N. E. 279 (1902). The authorities are collected in 25 L. R. A. (N. S.) 1045.

[121] *In re* Peavey's Estate, 144 Minn. 208, 175 N. W. 105 (1919).

[122] KALES, FUTURE INTERESTS, 2 ed., § 531.

V. A line of cases from *Doe d. Garner* v. *Lawson* (1803) [123] to *In re Hutchinson* (1919) [124] places a beacon on a shoal for the English conveyancer. In the latter case after a life interest to the wife in the whole of his estate the testator gave the whole of the residue in trust for his three daughters and their children in equal shares with cross remainders, and then "on failure of all the trusts hereinbefore declared of the residue of my personal estate, such residue shall be in trust for *such person or persons as on the failure of such trusts* shall be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estates of intestates, such persons if more than one to take distributively according to the said statutes." [125] The Court of Appeal constrained by authority [126] held that the class of persons called "next of kin" was to be determined at the death of the testator, and not at the time of the failure of the trusts. But on appeal the House of Lords,[127] five judges agreeing, distinguished the prior cases, reversed the order of the Court of Appeal, and held that the persons who would be the next of kin of the testator, had he died at the date of the failure of the earlier trusts, were entitled.[128]

Nor is the Massachusetts lawyer less likely to err. For although in *Carr* v. *New England Anti-Vivisection Society*,[129] the court held, in a devise to a wife for life and upon her death "to my heirs at law then living, said heirs to take the same as by the statute of descent and distribution," that those should take who would have been his heirs at law had he died at the time of the termination of the life estate; yet in *Dove* v. *Torr* [130] (1879) not cited in the Carr

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[123] 3 East, 278 (1803).

[124] [1919] 2 Ch. 17 (C. A.).

[125] Italics ours.

[126] Bullock *v.* Downes, 9 H. L. C. 1 (1860); Mortimer *v.* Slater, 7 Ch. D. 322, 327, 330 (1877); *sub nom.* Mortimore *v.* Mortimore, 4 A. C. 448 (1879); *In re* Wilson, [1907] 2 Ch. 572, 575.

[127] *Sub nom.* Hutchinson *v.* National Refuges for Children, [1920] A. C. 794.

[128] Lord Atkinson's opinion contains a review of the cases. Many of them turned on the question whether the word "then" was used as an adverb of time or was equivalent to "in that event."

[129] 234 Mass. 217, 125 N. E. 158 (1919).

[130] 128 Mass. 38 (1879). Compare United States Trust Co. *v.* Nathan, 112 Misc. 502, 183 N. Y. Supp. 66 (1920), "descendants" construed to mean descendants at the death of a prior taker, not at the death of the testator. See Trull *v.* Tarbell, 236 Mass. 68, 127 N. E. 541 (1920); Himmel *v.* Himmel, 128 N. E. (Ill.) 641 (1920). In Bibb *v.* Bibb, 86 So. (Ala.) 376 (1920), the court construed the word "heirs" in a devise

case, Chief Justice Gray held that heirs of the testator at the time of his death were designated in a clause which gave the residue of realty to daughters and the survivor of them till death or marriage and that "after the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." There are, indeed, other slippery words beside "issue!"

VI. If a testator in a will gives no indication whether he means the words "issue," "heirs," or "children" to include an adopted child, a case of peculiar difficulty arises. Generally the testator has never thought at all of this situation. Indeed if he had, it is hardly possible that he would not have clearly expressed himself. The person claiming by adoption in this case where the testator has no real intent must show first that by the adoption act he was given the requisite status of an "heir," "child," or "issue" by birth of the adopting parent; and secondly, that the word used in the instrument was so comprehensive as to include the person who obtained the necessary status by any means. The questions are questions of construction, — the first of a statute, the second of a deed or will.[131]

In *Muriel* v. *Gruenewald*,[132] by will the testator gave a life estate to his wife, and after her death the property was to be divided among his children; should any of the children die before his wife, in that event the share that would fall to each child was to go to his (that child's) children. A daughter of the testator died before her mother, leaving an adopted child, who was allowed by the Illinois court to take under the will. Acts similar to the Illinois statute have been held to give the adopted person the status of a child by birth.[133] The word "children" in a will *prima facie* in-

of real estate, after a life estate to the testator's daughter, or trust for the use of the "heirs" of the trustee to mean heirs at the death of the trustee.

[131] KALES, FUTURE INTERESTS, 2 ed., § 584.

[132] 289 Ill. 468, 124 N. E. 605 (1919). The Illinois adoption act contains the following provision: "A child so adopted shall be deemed, for the purpose of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock." ILLINOIS, ANNOT. STAT. (1913), § 197.

[133] Bray *v.* Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899); Sewall *v.* Roberts, 115 Mass. 262 (1874) (the Massachusetts Act has since been amended);

cludes a child adopted by the testator.[134] It is and should be immaterial that the adopted child is adopted by some one other than the settlor or testator in the absence of special legislation on the point.[135] The mind of the adopting parent and the stranger is alike in both cases. *Muriel* v. *Gruenewald* settles the point for Illinois; though an earlier case had indicated that little stress should be laid on this circumstance.[136]

The Illinois statute was copied from an early act in Massachusetts. But the law in Massachusetts was substantially changed and the rights of the adopted child narrowed in 1876.[137] In *Young* v. *Stearns*,[138] by will made in 1870 the testatrix left all her estate to her husband for life and after his death "the estate to go to my lawful heirs." In 1871 she and her husband adopted a daughter, who married and had two children. The testatrix died in 1897, and her husband also died. As earlier decisions[139] had given full effect to the clause of section 8 of the statute re-

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Hartwell *v.* Tefft, 19 R. I. 644, 35 Atl. 882 (1896). Compare Butterfield *v.* Sawyer, 187 Ill. 598, 58 N. E. 602 (1900); Rauch *v.* Metz, 212 S. W. (Mo.) 353 (1919); Lichter *v.* Thiers, 139 Wis. 481, 121 N. W. 153 (1909). Compare 7 CALIFORNIA L. REV. 355.

[134] Russell *v.* Russell, 84 Ala. 48, 3 So. 900 (1887) (*semble*); Virgin *v.* Marwick, 97 Me. 578, 55 Atl. 520 (1903); Von Beck *v.* Thomsen, 44 App. Div. 373, 60 N. Y. Supp. 1094 (1899) (affirmed in 167 N. Y. 601, 60 N. E. 1121 (1901)).

[135] Bray *v.* Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899); Sewell *v.* Roberts, 115 Mass. 262 (1874); Rauch *v.* Metz, 212 S. W. (Mo.) 353, 357 (1919); Hartwell *v.* Tefft, 19 R. I. 644, 35 Atl. 882 (1896). But see Woodcock's Appeal, 103 Me. 214, 68 Atl. 821 (1907).

[136] Butterfield *v.* Sawyer, 187 Ill. 598, 58 N. E. 602 (1900).

[137] The Massachusetts statute is as follows: Section 7. "As to the succession of property, a person adopted . . . shall take the same share of property which the adopting parent could have devised by will that he would have taken if born to such parent in lawful wedlock, and he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if so born to him" and in case of intestacy of the adopted child, what he acquired from his new parent should be distributed according to the statutes as if he had been born in wedlock to his adopting parents. Section 8. "The term child, or its equivalent, in a grant, trust-settlement, entail, devise or bequest, shall be held to include a child adopted by the settler, grantor or testator, unless the contrary plainly appears by the terms of the instrument; but when the settler, grantor, or testator is not himself the adopting parent, the child by adoption shall not have, under such an instrument, the rights of a child born in lawful wedlock to the adopting parent," unless a contrary intention appears. STATS. (1876) c. 213, §§ 8 & 9; PUB. STATS. (1882) c. 148, §§ 7 & 8; REV. LAWS (1902), c. 154, §§ 7 & 8.

[138] 234 Mass. 540, 125 N. E. 697 (1920).

[139] Wyeth *v.* Stone, 144 Mass. 441, 11 N. E. 729 (1887); Blodgett *v.* Stowell, 189 Mass. 142, 75 N. E. 138 (1905).

quiring the adopted child to show clearly that it was referred to in a devise to children by some one other than the adopting parent, the rights of these children were not free from doubt. But the Massachusetts court held that the two children of the adopted daughter took. The court reasoned thus: It had been said in *Wyeth* v. *Stone* [140] that if by will property was given by terms such as "issue" or "heirs" which embraced a child born in wedlock, section 8 applied to the construction of the instrument; by "lawful heirs" the testatrix meant to include the adopted child itself; by the laws of inheritance [141] land descends to children "and to the issue of any deceased child by right of representation;" the legislature meant to put "an adopted child on the same footing as a child born in wedlock to the adopting parents;" the two children took the estate to which their mother, the adopted daughter, if living would have succeeded. That the child was adopted after the will is immaterial.[142] Amendments to adoption acts may apply to children adopted prior to the passage of such amendments.[143]

VII. In *Love* v. *Love* [144] the testator, who died in 1873, left his lands to his wife for life and "at her death to my youngest son, Calhoun Love, and his heirs lawfully begotten in fee simple forever, but in case my said son shall die without issue, the said lands mentioned above are to revert back and be equally divided between his brothers and their heirs forever." The widow died in 1893. Calhoun Love never married, but he had an illegitimate child born in 1894, who in 1908 was legitimated by proceedings in court under the statute in North Carolina. Calhoun Love died in 1919 leaving this child. It was held that he died without issue. The North Carolina statute [145] was narrowly construed not to make by legitimation the adopted child kin of the kindred of the adopting parent; but to create simply a personal status between father and son with

[140] 144 Mass. 441, 443–444, 11 N. E. 729 (1887).

[141] REV. LAWS (1902), c. 133, § 1.

[142] Butterfield *v.* Sawyer, 187 Ill. 598, 58 N. E. 602 (1900); McGunnigle *v.* McKee, 77 Pa. 81 (1874); Johnson's Appeal, 88 Pa. 346 (1879).

[143] *In re* Frost's Will, 192 App. Div. 206, 182 N. Y. Supp. 559 (1920).

[144] 179 N. C. 115, 101 S. E. 562 (1919).

[145] "The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock." NORTH CAROLINA REV. STATS., § 264.

the right of the child to inherit from the father these properties which the latter might give his child during his lifetime, and did not make him heir general so that he could take "an estate by limitation, as heir of heirs;" and therefore he was not "issue." The court also laid stress on the words "heirs lawfully begotten," which is the stronger ground upon which to support the case.

In *Grantham* v. *Jinnette*,[146] the testator, a bastard, devised his property after a life estate to his wife to his "legal heirs." It was said that it could not be shown that he meant by that term two sons of his mother's sister who under the statute of descents from illegitimates were not qualified to take; for here the words were clear, and these relatives did not come within the designation.

A power of appointment to "my people" was held well exercised by appointing to a child of an illegitimate daughter of the donor's mother.[147]

VIII. "Or" has been construed "and" to effectuate the intention of the testator not to die partially intestate in two cases;[148] and "both" as "either" in another.[149]

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[*To be concluded.*]

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[146] 177 N. C. 229, 98 S. E. 724 (1919).

[147] *In re* Keighley, [1919] 2 Ch. 388.

[148] Hardy *v.* Smith, 123 N. E. (Ind. App.) 438 (1919); Dunbar *v.* Hammond, 234 Mass. (N. E.) 554 (1920). See THEOBALD, WILLS, 7 ed., 703–705; Wickersham's Estate, 261 Pa. 121, 104 Atl. 509 (1918).

[149] Struss *v.* Fidelity Trust Co., 182 Ky. 106, 206 S. W. 177 (1918).